APPEAL NO. 040295
FILED MARCH 31, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on January 15, 2004. The hearing officer determined that Dr. G was not improperly appointed designated doctor in accordance with Section 408.0041 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5 (Rule 130.5); that the respondent's (claimant) correct impairment rating (IR) cannot be determined from the evidence; and that a second designated doctor should be appointed to determine IR in this case. The appellant (carrier) appealed the determinations that the IR cannot be determined from the evidence and that a second designated doctor should be appointed to determine the IR, asserting that the hearing officer failed to correctly apply the law, and that his decision is not supported by the evidence. The claimant responded, urging affirmance. The hearing officer's determination that Dr. G was properly appointed to act as designated doctor has not been appealed and has become final. Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

It is undisputed that Dr. G was appointed by the Texas Workers' Compensation Commission (Commission) to act as designated doctor in this matter. According to the claimant's testimony, he was initially examined by Dr. G on December 17, 2002, and awarded an 11% IR. The Report of Medical Evaluation (TWCC-69) from that examination was not in evidence. The record reflects that the claimant was again examined by Dr. G on April 2, 2003, at which time he was awarded an 8% IR. The TWCC-69 and accompanying narrative report from the second examination was in evidence. The parties agreed that the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) was the proper version to be used. No other IR certifications were submitted into the record.

The hearing officer reviewed Dr. G's April 2, 2003, TWCC-69 and accompanying narrative report, and determined that the certification is not in compliance with the AMA Guides, and therefore cannot be the basis for the assignment of an IR. The hearing officer specifically stated that Dr. G's report was not in compliance with the AMA Guides for the following reasons:

> (1) No explanation was included for the failure to assign an [IR] for nerve loss despite the comment that an EMG "revealed nerve root or sensory pathway dysfunction at right L5 level."
>
> (2) Limitations on right and left lateral flexions, which amount to a 10% [IR], were improperly excluded presumably on the erroneous theory that

flexion and extension and/or straight leg test results invalidated lateral flexion limitations.

(3) The selection of Table 49, Section II.D (surgery without residuals) instead of Section II.E (surgery with residuals) was not explained despite the reports of [Dr. H] and [Dr. B]. Nor was the failure to include an additional one percent for the additional surgical level explained.

We find that the hearing officer sufficiently explained his concerns regarding Dr. G's compliance with the AMA Guides in reaching his 8% IR certification, and that the hearing officer's determination that the claimant's IR cannot be determined from the evidence presented is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We next turn to the hearing officer's determination that Dr. G is unable and/or unwilling to serve as designated doctor in this case, and that a second designated doctor should be appointed. In Texas Workers' Compensation Commission Appeal No. 011607, decided August 28, 2001, the Appeals Panel noted that it has held that a designated doctor should not be replaced by a second designated doctor absent a substantial basis to do so, and that normally the appointment of a second designated doctor is appropriate only in those cases where the first designated doctor is unable or unwilling to comply with the required AMA Guides or requests from the Commission for clarification, or if he or she compromises the impartiality demanded of the designated doctor. In the instant case, the hearing officer specifically identifies what he perceives to be defects in Dr. G's certification. However, nothing in the record indicates that the Commission has ever requested clarification from Dr. G regarding his proper utilization of the AMA Guides, how he arrived at his IR, and why he declined to give a rating for certain conditions. The mere fact that the hearing officer determined that the designated doctor's report was "seriously" flawed, does not mean that the doctor is unwilling or unable to act as designated doctor. When a hearing officer determines that a designated doctor's report may be flawed, the remedy is to seek clarification, not to appoint a new designated doctor. Based upon our review of the record in this case, we find no evidence that a "substantial basis" exists so as to require the appointment of a second designated doctor.

The hearing officer's determination that the claimant's IR cannot be determined based upon the evidence submitted is affirmed. The hearing officer's determination that a second designated doctor should be appointed is reversed and remanded back to the hearing officer. On remand, the hearing officer is directed to send Dr. G a letter of clarification which specifically asks Dr. G how he arrived at his 8% IR, and to explain why he chose not to include ratings for the conditions outlined in the hearing officer's statement and discussion of the evidence and this Decision. Appointment of a second designated doctor is premature at this point, but may be necessary depending upon the designated doctor's response.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the insurance carrier is **TRINITY UNIVERSAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RONALD I. HENRY
10000 NORTH CENTRAL EXPRESSWAY
DALLAS, TEXAS 75230.

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Daniel R. Barry
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

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Thomas A. Knapp
Appeals Judge